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COURT DECISIONS AS INFORMATION SOURCES FOR JOURNALISTS: HOW JOURNALISTS CAN BETTER COVER APPELLATE DECISIONS

F. Dennis Hale*

Specialized media might accurately convey legal reasoning from courts to lawyers and judges, but mass media cannot, in Justice Scalia's view, even pretend to grasp what the judges are doing and so must mangle judicial news in transmission.¹

Journalists are primarily interested in the story of one judge letting the air out of another judge's tire or when he throws an inkwell.²

Thousands of writers and journalists have reported on the issue of abortion. Precious few, however, have read *Roe v. Wade*,³ the 1973 United States Supreme Court decision that ignited the debate about the constitutional right to an abortion. Similarly, few of the countless reporters, columnists, and editorial writers who have written about capital punishment have ever bothered to read the Supreme Court's landmark decision on that subject, *Furman v. Georgia*.⁴

Writers who avoid reading appellate court decisions ignore a valuable and authoritative resource for information and quotations. Justice Harry Blackmun's majority opinion in *Roe* included an observation that is as relevant today as it was twenty-seven years ago: "One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion."⁵ Equally quotable statements appeared in the other justices' opinions in *Roe*. Justice William O. Douglas observed in a concurring opinion: "The right of privacy has no more conspicuous place than in the physician-patient relationship, unless it be

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1. WILLIAM HALTOM, REPORTING ON THE COURTS: HOW THE MASS MEDIA COVER JUDICIAL ACTIONS 63 (1998).

2. LYLE W. DENNISTON, THE REPORTER AND THE LAW: TECHNIQUES OF COVERING THE COURTS 51 (1980) (quoting Justice William O. Douglas).

3. 410 U.S. 113 (1973).

4. 408 U.S. 238 (1972). In *Furman*, the Supreme Court held that the imposition and carrying out of the death penalty was cruel and unusual punishment in the limited cases before the court. See *id.* at 239-40.

5. *Roe*, 410 U.S. at 116.

the priest-penitent relationship.”⁶ Justice Byron White expressed a contrary argument in a dissent in *Roe* that accused the Court of exercising “raw judicial power” and of usurping state authority: “The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus.”⁷

Over a quarter of a century later the debate about abortion continues. More recent appellate court decisions also contain information on abortion issues that is valuable to both freelance writers and traditional journalists. In 1996, a divided California Supreme Court upheld that state’s informed consent law.⁸ Such laws, which then existed in twenty-seven states, require minor children who seek abortions to obtain the permission of a parent or a judge.⁹ Justice Stanley Mosk wrote the majority opinion upholding the law.¹⁰ Mosk argued that parents should have the final word about medical procedures for minor children, regardless of the seriousness of the procedure: “Certainly, a parent can force an obdurate six-year-old—or sixteen-year-old—to get a tetanus vaccination.”¹¹

But Justice Joyce Kennard’s dissent provided equally compelling considerations: “Without question this is one of the most important and difficult cases we have decided in many years.”¹² She added: “Not every pregnant adolescent has parents out of the comforting and idyllic world of a Norman Rockwell painting.”¹³

This essay underscores the value of appellate court decisions, especially those of state supreme courts, as authoritative sources of facts, quotations, opinions, and data for news stories, features, columns, editorials, and commentaries. State appellate decisions are obviously a source of consequential news when initially released by courts, but the court decisions also are a source of background and historic information and pro-and-con viewpoints years after they are released.

Discourse in appellate court decisions mirrors the debate about issues in the greater society. This applies to the broad spectrum of

6. *Doe v. Bolton*, 410 U.S. 179, 219 (1973) (Douglas, J., concurring). Justice Douglas also concurred in *Roe*. See *Roe*, 410 U.S. at 167.

7. *Doe*, 410 U.S. at 222 (White, J., dissenting). Justice White also dissented in *Roe*. See *Roe*, 410 U.S. at 167.

8. See *American Academy of Pediatrics v. Lungren*, 912 P.2d 1148 (Cal. 1996).

9. See *id.* at 1159.

10. See *id.* at 1151.

11. *Id.* at 1159.

12. *Id.* at 1170.

13. *Id.* at 1171.

political, social, and economic issues—not just to abortion. Appellate decisions exist on virtually all topics because of the American tradition of litigating any and all social conflicts. Appellate decisions are not limited to contemporary issues. They also provide information about legal and social conflicts from 50 or 100 years ago. Published court decisions containing facts, quotations, and sources exist for every one of the fifty states beginning with the year in which the state courts were established. We even have judicial decisions from before statehood in the form of published decisions of territorial courts.

Unlike many sources of quotations and facts, information from court decisions is legally safe to publish. Appellate decisions are in the public domain and are not copyrighted. They may be quoted at length without anyone's permission, and their content cannot lead to a lawsuit over invasion of privacy. Court decisions also are libel-proof. The legal doctrine of qualified privilege, which exists in every state, allows writers to quote from court decisions without fear of libel or defamation suits. This is particularly true if the writer directly attributes controversial information to a court decision.

The good news about appellate court decisions as sources of information is that today they are more public and convenient than ever before. Fifteen years ago a reporter who wanted to read a court decision had to locate a law library, travel to that library, find the proper volume containing the court decision, and read the court case. If it was a long decision, and the reporter's time was limited, it was necessary to photocopy the case at considerable expense and to take it home or to the office to read.

The age of the Internet has changed all of that. If the reporter has access to one of the two major services that report cases on the Internet—Westlaw or Lexis—virtually every state or federal court decision that has been published during the history of the republic is available instantaneously. However, a reporter does not have to subscribe to the legal services of Lexis or Westlaw to call up many of the nation's appellate court decisions. Most of the decisions of the United States Supreme Court are available at any of a number of free Internet sites as are many decisions of the United States Courts of Appeals. Additionally, most state supreme courts maintain free Internet sites where the most recent decisions from the highest court and intermediate appeals courts of that state are published. For journalists and writers without Lexis or Westlaw accounts, access to appellate decisions may not be as comprehensive or convenient, but there is still a significant amount of free legal information available on the Internet.

The beauty of Internet access to court decisions is that it is available everywhere, not just in large cities or in towns with university or law libraries. You can write knowledgeably about legal issues such as medical malpractice or tort reform as easily from a mountain cabin in West Virginia or Idaho as from a metropolitan city such as Chicago or Dallas.

Journalists and writers will benefit from paying more attention to recent decisions of state supreme courts and from exploring the older decisions of such courts as sources for unique and invaluable information. Justification for such a perspective may be found in the rich and growing literature about press coverage of the United States Supreme Court. This literature is quite extensive, beginning with books that were published in the 1960s by mass media scholars and political scientists David Grey, Stephen Wasby, and Richard Johnson.¹⁴ These studies emphasized the uniqueness of the Supreme Court as an institution and newsmaker.

The Court accepts for review only three percent of the cases appealed to it, and it provides no explanation for either accepting or rejecting an appeal.¹⁵ In those rare instances when the court agrees to review a case, only one event is visible to the press and public: oral arguments, during which attorneys from both sides appear before the court for one hour of questioning by the nine Justices. The Supreme Court is most newsworthy when it files a written decision, which happens only about 100 times a year. These events are unlike the news happenings in the executive or legislative branches of government. There is no warning about the day when a decision about a particular case will be filed and released to the public. Court decisions also stand on their own because neither Court justices nor administrators will comment on them and, unlike other agencies in state and federal governments, there are few news leaks in the Supreme Court. Therefore, Supreme Court reporters must lean heavily on the content of the Court's decisions and outside observers for information for their stories.

In 1996, two journalists who regularly cover the Supreme Court discussed obstacles to such media coverage. Tony Mauro, *USA Today*

14. See generally DAVID L. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* (1968); RICHARD M. JOHNSON, *THE DYNAMICS OF COMPLIANCE: SUPREME COURT DECISION-MAKING FROM A NEW PERSPECTIVE* (1967); STEPHEN L. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1967).

15. See F. Dennis Hale, *Free Expression: The First Five Years of the Rehnquist Court*, 69 JOURNALISM Q. 89, 97 (1992). Some 2.9% of cases were accepted by the Rehnquist Court compared to 3.7% for the Burger Court and 4.3% for the Warren Court. See *id.*

correspondent, criticized the Court for banning cameras in its courtroom and for choosing to speak only through its opinions.¹⁶ Linda Greenhouse, a *New York Times* reporter who earned a Pulitzer Prize for her reporting on the Court, criticized the Court for releasing four or more decisions in one hour.¹⁷ She also expressed regret about the shrinking number of journalists who cover the Supreme Court full-time.¹⁸

Two books published in the 1990s indicate that the issue of media coverage of the Supreme Court continues to attract attention from academic researchers. A book by two political scientists, Elliot Slotnick and Jennifer Segal, focused on Supreme Court coverage by the television networks.¹⁹ The book found that the increasing emphasis in recent years on entertainment value and on audience ratings had reduced coverage of the Court.²⁰ In 1989, twenty-three percent of Court decisions were reported on at least one network.²¹ This had dropped to seventeen percent in 1994.²² The book reports comments by at least one newspaper correspondent, Lyle Denniston, that hint that diminished coverage is in part due to diminished newsworthiness.²³ Denniston remarks that we no longer receive landmark, precedent-setting decisions from the Court. He states that current decisions are decided more narrowly, have less impact, and are more reflective of fine-tuning and tinkering than of broad policy making.²⁴

In 1994, political scientist Richard Davis published a book with the intriguing thesis that the Court seeks public deference and public compliance through a conscious public information philosophy of engaging in minimal public relations.²⁵ Davis argued that active public relations by the Court would destroy its image of independence.²⁶ He said the Court will not allow its written work—its written decisions—to

16. See A YEAR IN THE LIFE OF THE SUPREME COURT 263-278 (Rodney Smolla ed., 1995).

17. See Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1550 (1996).

18. See *id.* at 1540-41.

19. See ELLIOT E. SLOTNICK & JENNIFER A. SEGAL, *TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR?* (1998).

20. See *id.* at 162.

21. See *id.* at 170.

22. See *id.*

23. See *id.* at 62.

24. See *id.*

25. See RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* (1994).

26. See *id.* at 9.

be upstaged.²⁷ Davis asserted that the Court and the press are engaged in an invisible dance that is led by the Court.²⁸ Davis concluded that the Court "has been stunningly successful at focusing press attention on its product and deflecting attention away from the individuals who produce it."²⁹

Coverage of intermediate appellate courts, such as the United States Courts of Appeals and intermediate appellate courts in forty of the states, pose special problems for journalists. On occasion such courts create important law, but their decision-making is not as consequential as that of the courts above them. Also, the intermediate courts decide quite a few cases that are important only to the two parties involved and do not address novel or broad issues of legal policy. Intermediate appellate courts are required by law to review most of the cases appealed to them. This mandatory review is quite different from the discretionary review enjoyed by the Supreme Court and most of the state supreme courts, which allows the highest courts to concentrate on only those case with genuine legal significance. Reporters who cover intermediate appellate courts face a task quite different from covering the United States Supreme Court or state supreme courts. The reporters must separate the routine appeals, those involving parties who simply want the legal questions of their trials scrutinized, from the handful of cases that involve genuine and consequential policy questions.

State supreme court decisions often receive only token coverage. Four studies this author conducted over the last thirty years are particularly relevant to the topic of press coverage of state supreme courts. Each study identified a low or superficial level of newspaper coverage of the courts, or significant dissatisfaction by the justices concerning the quantity and quality of coverage of court decisions.

In the first study, in 1970, interviews were conducted in Olympia, Washington, with eight current or former reporters for the Associated Press and United Press International and with nine current or former members of the Washington State Supreme Court.³⁰ Significant differences in perceptions emerged between the justices and journalists. When asked, "How well is the state supreme court covered by the press compared to other branches of state government?" the nine justices

27. See *id.* at 130.

28. See *id.* at 114.

29. *Id.* at 134.

30. See F. Dennis Hale, *The Court's Perception of the Press*, 57 JUDICATURE 182, 189 (1973). See also F. Dennis Hale, *How Reporters and Justices View Coverage of a State Appellate Court*, 52 JOURNALISM Q. 106, 106-110 (1975).

unanimously agreed that the court was not covered as comprehensively as the legislature or the governor.³¹ Some justices explained away this disparity because of the differences in newsworthiness between the institutions.³² "It's not a fair comparison. We're not in the news-making business. Politicians are," one justice said.³³ But other justices were critical of the press. One said, "Every lousy, minor commission has a publicity agent, paid for by the people, someone working daily to get information out. We don't have a publicist."³⁴ The wire service reporters expressed just the opposite reaction. Seven of eight reporters said that press coverage of the state supreme court was comparable or superior to coverage of the other branches of government.³⁵

The research in Washington State was followed by an analysis of one of the most powerful state courts in the nation, the California Supreme Court. A content analysis was conducted of coverage by ten newspapers of all 139 decisions from the California court's 1972 term.³⁶ These cases were presumably legally significant—the court accepted only 10% of the cases that were appealed. Major findings revealed that the mean performance of the papers was to report 20% of the cases.³⁷ Although the quantity of court coverage was certainly questionable, there were positive aspects about the quality of coverage. Newspaper coverage of court decisions correlated to the frequency of future citations by the California Supreme Court and discussions of the cases in California law journals.³⁸

In 1995, a national survey was conducted of the fifty state chief justices to determine if the negative evaluations by members of the Washington State Supreme Court also extended to other courts.³⁹ Justices were asked the following questions: "How thoroughly is your

31. See F. Dennis Hale, *The Court's Perception of the Press*, 57 JUDICATURE 182, 184 (1973).

32. See *id.*

33. See *id.*

34. See *id.*

35. See *id.*

36. See F. Dennis Hale, *Press Releases vs. Newspaper Coverage of California Supreme Court Decisions*, 55 JOURNALISM Q. 696 (1979). See also F. Dennis Hale, *Factors Associated With Newspaper Coverage of California Supreme Court Decisions*, 6 ORANGE COUNTY B.J. 28 (1979).

37. See F. Dennis Hale, *Factors Associated With Newspaper Coverage*, 6 ORANGE COUNTY B.J. 28, 31 (1979).

38. See *id.* at 32. Only 8% of the cases were covered by 7 or more papers and 55% were ignored by all of the papers. Additionally, only 6 of the total of 139 decisions, or 4%, were covered by all 10 dailies in the study. See *id.* at 33.

39. See F. Dennis Hale, *Chief Justices' Perceptions of News Coverage of State Supreme Courts*, 20 NEWSPAPER RES. J. 17 (1999).

court covered by the news media compared to the executive and legislative branches of state government;⁴⁰ "How thoroughly are your court's decisions covered by the news media compared to the decisions of the United States Supreme Court;"⁴¹ and "How aware are your state's citizens of your court compared to the legislature?"⁴² Responses in the negative range were received for all three questions.⁴³

In 1997, another national survey was conducted, this time with recently retired members of state supreme courts.⁴⁴ Out of 120 surveys sent, forty-two percent responded.⁴⁵ The retired justices were asked the same three questions as the chief justices two years earlier, and they gave similar responses.⁴⁶ This survey also included some additional measures of satisfaction with press coverage.⁴⁷ The justices were also asked to evaluate three dimensions of news coverage of three court activities: the fairness, accuracy, and thoroughness of coverage of written decisions, oral arguments, and judicial campaigns. The overall mean score for judicial campaigns was the lowest.⁴⁸ Mean scores for court decisions and oral arguments were slightly more positive.⁴⁹ Of the

40. *See id.* at 24. Of the 72% of chief justices who answered the survey, 86% responded with "less thoroughly," 11% "the same," and 3% "more thoroughly." This represented a mean score of 0.6 on a scale of 0 to 4 with a midpoint of 2. *See id.* at 24.

41. *See id.* at 25. On this question, 49% of the justices said "less thoroughly," 29% "about the same," and 22% "more thoroughly." This represented a mean score of 1.6 on the 0-4 scale. *See id.*

42. *See id.* at 25. The chief justices responded with 83% "less aware of court," 15% "same awareness," and 3% "more aware of court." This represented a mean score of 1.0 on the 0-4 scale. *See id.*

43. *See id.*

44. *See* F. Dennis Hale, *Dimensions of State Justices' Attitudes Concerning Freedom of Expression*, AEJMC Southeast Colloquium, March 1998, New Orleans.

45. *See id.* at 25.

46. *See id.* at 27. Asked how thoroughly the court was covered compared to the executive and legislative branches of government, the mean response was a weak 0.8 on the 0-4 scale (compared to 0.6 for the state chief justices). *See id.* Asked to contrast news coverage of state supreme court decisions with those of the United States Supreme Court, the mean rating was a weak 1.3, which compared to 1.6 for the chief justices. *See id.* When asked to compare citizen awareness of the court and legislature, the mean response was a very negative 0.7 compared to 1.0 for the chief justices. *See id.*

47. *See id.* at 28. Asked to evaluate press coverage of themselves, of the "news media's coverage of you as a state supreme court member," the justices gave a positive mean of 2.9 on the 0-4 scale. *See id.*

48. *See id.* at 27 (a 1.72 on a 0-4 scale with 2.0 as the midpoint).

49. *See id.* at 27. These scores were tied at 2.2. *See id.*

three dimensions of coverage, accuracy received the highest mark, followed by fairness, with thoroughness ranking the weakest.⁵⁰

A similar lack of thoroughness was identified in a quantitative study by Rebekah Bromley of newspaper coverage of the decisions of the United States Court of Appeals for the Sixth Circuit.⁵¹ Her study in the early 1990s measured news coverage by six metropolitan dailies and the Associated Press in the four states that comprise the Sixth Circuit—Michigan, Ohio, Kentucky, and Tennessee. The study examined coverage before and after the installation of a court online information service, Court Information Transmitted Electronically, that made the full text of newly filed court opinions available instantly to the newspaper journalists.⁵² Bromley discovered that the online delivery service did not change the pattern of newspaper coverage.⁵³ Some .1%, or one in a thousand of the court opinions, were covered both before and after the online service.⁵⁴ Bromley concluded that the “new online technology did not increase coverage of the thirteen intermediate courts of appeals, effectively the courts of last resort for the vast majority of federal litigants.”⁵⁵ She noted that the combined circuits of the United States Courts of Appeals in the early 1990s decided 22,700 cases a year on their merits, compared to fewer than 150 cases a year by the Supreme Court.⁵⁶

Other court participants and scholars agree with these findings that identify sparse coverage of state appellate courts. Justice Judith S. Kaye, the chief judge of the New York Court of Appeals, the highest court in that state, concluded that “it is no overstatement that the courts have not fared well in the media. Sensational reports on a handful of cases distort the public’s understanding of their justice system.”⁵⁷ In a 1998 essay, the justice observed that a space alien gathering all his or her information about the New York Court of Appeals from the popular press, would conclude that “the court issues five or six decisions a year, all criminal and all releasing egregiously guilty defendants to menace

50. See *id.* at 28. Accuracy was evaluated at 2.5, fairness at 2.4, and thoroughness at 1.7. See *id.*

51. See Rebekah Bromley, *Journalists Assess Computers’ Value in Covering U.S. Courts of Appeals*, 15 NEWSPAPER RES. J. 2 (1994).

52. See *id.* at 3.

53. See *id.* at 2.

54. See *id.* at 3.

55. *Id.*

56. See *id.*

57. Judith S. Kaye, *The Third Branch and the Fourth Estate*, in COVERING THE COURTS: FREE PRESS, FAIR TRIAL & JOURNALISTIC PERFORMANCE 38 (Robert Giles & Robert W. Snyder eds., 1999).

society.”⁵⁸ Justice Kaye said that if this selective press coverage “gave more of the court’s reasoning, it would be less troubling.”⁵⁹ She concluded: “My plea is for more complete, more informed, more balanced coverage of courts.”⁶⁰

A comprehensive review of scholarly research concerning press coverage of the courts, published a year after Justice Kaye’s essay, reached some similar conclusions.⁶¹ Political scientist William Haltom analyzed research from law, mass media studies, political science, criminology, and sociology. In his book on media coverage of the courts, he devoted separate chapters to the Supreme Court, other state and appellate courts, criminal trials, and civil trials.⁶² Haltom offers some rather colorful descriptions of press coverage of state supreme courts, even in the chapter title on the subject, “Modest Coverage of Appellate Courts.”⁶³ He refers to the issue as “the puzzle of appellate noncoverage” and “selective, haphazard, minimal coverage,” and observes that such coverage “usually is nonexistent.”⁶⁴ Referring to state supreme courts, he notes that “appellate courts routinely *make law, guarantee justice, and secure order*, so appellate adjudication is crucial in any legal system.”⁶⁵ Haltom contrasts press coverage of trial courts and the United States Supreme Court with coverage of other appellate courts: “Between profane, titillating trials and the sacred, imposing Court, state appellate courts and the United States Courts of Appeals receive very little coverage from the mass media.”⁶⁶ Haltom also observed: “Do not expect the press to report most appeals poorly; expect the press to cover most appeals *not at all*.”⁶⁷ He was particularly critical of the lack of reporting of the reasoning of appellate courts: “For the majority of cases covered, coverage consists of who won and who lost and little else.”⁶⁸

Mention published court decisions and most people think of the United States Supreme Court in Washington, D.C. But the nation’s highest court is only the tip of the appellate judicial iceberg. Locating

58. *Id.*

59. *Id.*

60. *Id.* at 82.

61. See generally HALTOM, *supra* note 1.

62. See *id.*

63. See *id.* at 119.

64. See *id.* at 120-21, 142.

65. See *id.* at 124.

66. See *id.* at 126.

67. See HALTOM, *supra* note 1, at 128 (emphasis in original).

68. See *id.*

a court decision is only the first step for a reporter. The real work comes in perusing the lengthy decision in search of the logic and reasoning, noteworthy facts, and quotes.

Court opinions should be examined to find the strongest material. This involves reading more than just the majority opinion. Concurring and dissenting opinions contain additional arguments and facts. They are often more quotable and controversial because they express the uncompromised view of only one or two judges. Additionally, the footnotes in appellate decisions often provide sources for supporting facts and general information, some of which comes from books, magazine articles, and government reports. Appellate courts often rely on secondary sources to discuss the nonlegal aspects of issues ranging from suicide to road construction because they lack the fact-gathering authority of Congress and state legislatures to conduct hearings with expert witnesses and to commission independent studies.

The most obvious and knowledgeable source of court information, however, is frequently unavailable. Judicial authors of court decisions are unwilling to comment about their official opinions either on- or off-the-record. Court decisions must stand on their own merit without embellishment by the justices who wrote them.⁶⁹ Therefore, journalists who consult written court decisions for information are most often left to find it on their own.

Appellate decisions are wonderfully convenient and public sources of information. But they are not painless sources. Their style can often be wordy or technical, and the court's reasoning may seem convoluted. Judges write for other judges and attorneys and not for the general public or lay persons. Additionally, the subject matter of appellate decisions is often dull and dry and concerns such mundane issues as real estate, workers' compensation, divorce agreements, and attorney misconduct.

However, some appellate decisions deal with burning issues such as gun control, crowded prisons, public school funding, the death penalty, and affirmative action. And some appellate decisions are written by justices who take great pride in the clarity of their writing. These cases can be useful due to a judge's clear and concise logic or because their words convey ideas of honesty and justice. Journalists

69. See F. Dennis Hale, *supra* note 39, at 24. A 1995 survey of state chief justices found that 97% objected to providing the press with quoted comments about cases before their courts and 71% refused to provide journalists with background information or off-the-record explanations concerning such cases. See *id.*

should seek out these opinions and cover them thoroughly to increase the general public's understanding of the legal process.